



(27,778)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 421.

ALEXANDER KAHN, DONALD FISHER, ROBERT L. LE
COQ, ET AL., APPELLANTS,

v.s.

AUGUST V. ANDERSON, WARDEN OF THE UNITED
STATES PENITENTIARY AT LEAVENWORTH, KAN-
SAS.

Appeal from

~~IN THE~~ THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

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1 In the District Court of the United States for the District of Kansas.

No. 2081.

In the Matter of the Application of ALEXANDER KAHN, DONALD Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, for a Writ of Habeas Corpus.

Citation.

UNITED STATES OF AMERICA, *et al.*:

August V. Anderson, Warden, United States Penitentiary at Leavenworth, Kansas:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America to be holden at Washington, thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office, for the District Court of the United States, For the District of Kansas, wherein Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers, are appellants and you are appellee, to show cause, if any there be why the judgment and decree rendered against the said appellants, as — the said appeal mentioned should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable J. C. Pollock, Judge of the United States Court for the District of Kansas, this 11th day of June, in the year of Our Lord, Nineteen Hundred and Twenty.

JOHN C. POLLOCK,
District Judge.

UNITED STATES OF AMERICA,
District of Kansas, ss:

Due service of the within citation is hereby acknowledged this 11 day of June, 1920.

FRED ROBERTSON,
*United States District Attorney and
Solicitor for Appellee.*

1½ [Endorsed:] No. 2081. In the Matter of the Application of Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, for a Writ of Habeas Corpus. Filed June 11, 1920. F. L. Campbell, Clerk, by C. B. White, Dep. Clrk.

2 In the District Court of the United States for the District of Kansas.

In the Matter of the Application of ALEXANDER KAHN, DONALD Fisher, Robert L. Le Coe, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, for a Writ of Habeas Corpus.

Petition.

STATE OF KANSAS,

County of Leavenworth, as:

The petitioners, Alexander Kahn, Donald Fisher, Robert L. Le Coe, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, state that they are unjustly and unlawfully detained and imprisoned at the United States Penitentiary at Leavenworth, Kansas, by the Warden of said Penitentiary, A. V. Anderson, Esq., upon a charge and conviction of murder, which said charge is in words and figures as follows:

(Charge Sheet.)

United States Disciplinary Barracks.

Fort Leavenworth, Kansas.

August 31, 1918.

General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 2208; Tony Feo, Registered No. 12496; Robert R. Le Coe, Registered No. 12668; Donald Fisher, Registered No. 12667; Archibald N. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Schieman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry, alias Archie Whittenberry, Registered No. 13252; William F. Peters, Registered No. 13231; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534;

Witnesses, (See attached synopsis.)

Charge I: Violation of the 96th Article of War.

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Coe, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald N. Hawes, Registered No. 12945; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No.

3 13130; Archie Writtenberry, alias Archie Whittenberry, Registered No. 13252; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered Number 13534, did at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 27th, 28th and 29th days of July, 1918, unlawfully, wickedly, and maliciously conspire, confederate, and agree together feloniously, wilfully and of malice aforethought to kill and murder General Prisoner Shelby Hisle, Registered No. 13766.

Charge II: Violation of the 92nd Article of War.

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Peo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald N. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry, alias Archie Whittenberry, Registered No. 13252; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534, acting jointly and in pursuance of a common intent, did, at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 29th day of July, 1918, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and premeditatedly, kill General Prisoner Shelby Hisle, Registered No. 13766, a human being, by striking, kicking, stamping him and by cutting him with a knife.

JAMES B. ROUSSEAU,
1st Lieutenant, U. S. Army, Adjutant.

That said petitioners are citizens of the United States and that on or about the 29th day of July, 1918, they were each serving sentences for terms of more than one year imposed by General courts-martial, at said Disciplinary Barracks, at Fort Leavenworth, Kansas, and were not then members of or serving as soldiers in the army or armies of the United States. That said sentences were imposed for alleged military offenses committed within the geographical limits of the United States during the year 1918.

4 That on the 19th day of October, 1918, the President of the United States, by an order published by the War Department on October 22nd, 1918, appointed a general court-martial for the purpose of trying your petitioners on said charge of murder. That said order appointing said general court-martial is in words and figures as follows:

"Special Orders, No. 247.

War Department.

Extract.

266: The following order is published for the information and guidance of all concerned:

War Department.

Washington, October 19, 1918.

By direction of the President, the general court-martial appointed in an order published in paragraph 439, Special Orders No. 225, War Department, September 25, 1918, to meet at Fort Leavenworth, Kan., is dissolved; and a general court-martial as hereinafter constituted is appointed to meet at Fort Leavenworth, Kans., at the call of the senior member for the trial of such persons as may be brought before it.

Detail for the Court.

Maj. Samuel A. Smoke, United States Army, retired;

Capt. Henry M. Fales, United States Army, retired;

Capt. Eric O. A. Miller, Quartermaster Corps;

Capt. Harry C. Diesem, Engineer Corps;

Capt. George Pulsifer, Adjutant General's Department;

First Lieut. Marion Donker, United States Guards;

Second Lieut. Richard M. Lewis, United States Guards;

Second Lieut. William Jones, United States Guards;

Maj. Walter Smith, Coast Artillery Corps, Judge Advocate of the court; and

First Lieut. Louis A. Humason, Infantry, assistant Judge advocate of the court.

A greater number of officers can not be assembled without manifest injury to the service.

The court is empowered to proceed with the business before it with any number of members not less than the minimum prescribed by law.

Upon the final adjournment of the court the members, judge advocate and assistant judge advocate, will return to their proper stations.

NEWTON D. BAKER,
Secretary of War.

The journeys required of the members of the court and the judge advocate in complying with this order are necessary in the military service (250, 45, A. G. O.).

5 By Order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General."

That on the 4th day of November, 1918, pursuant to said order the said general court-martial convened at Pope Hall on the said military reservation at Fort Leavenworth, Kansas, and your petitioners were forcibly taken before said general court-martial and jointly placed upon trial on said charge of murder; that your petitioner Francis J. Cooney who was a drafted soldier at the time he became a general prisoner objected to the jurisdiction of said court-martial on the ground that the 92d Article of War prohibited the trial of any person by court-martial for murder committed within the geographical limits of the States of the Union in time of peace and that it was a time of peace in the State and District of Kansas and within the geographical limits of the United States on the 29th day of July, 1918; that all of your petitioners concurred in said objection to the jurisdiction of said court-martial; that said plea to the jurisdiction was then and there overruled by said court-martial and said court-martial, on and after said 4th day of November, 1918, from day to day to and including the 25th day of November, 1918, proceeded to try petitioners over said objection on said charge of murder and on said latter date found your petitioners guilty of said charge of murder and imposed sentences of death by hanging, on your petitioners, Alexander Kahn, Robert P. LeCocq and Donald Fisher and sentences of confinement at hard labor on each and every one of the other petitioners for the terms of their natural lives.

That on the 3rd day of February, 1920, the reviewing authority, to-wit: the President of the United States approved the findings of guilty of the charge and specification of murder and *and* 6 approved the sentence imposed as to each of your petitioners and commuted the sentence as to each of your petitioners, Alexander Kahn, Robert LeCocq and Donald Fisher to confinement at hard labor for the term of his natural life, and reduced the period of confinement at hard labor as to your petitioner, Francis J. Cooney, to twenty (20) years, and also reduced the period of confinement at hard labor provided in the sentence as to each of your petitioners William Cook, William Scheiman, George W. Jerue, William F. Peters, George A. Polson, and Millard Bowers to fifteen (15) years each and designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and further directed that said sentences as thus commuted and mitigated be carried into execution.

That on the 9th day of February, 1920, said findings, judgments

and sentences, together with the orders of the President were published by the War Department under an order designated "General Court Martial orders No. 21" which said order is in words and figures as follows:

"General Court-Martial Orders No. 21.

War Department.

Washington, February 9, 1920.

Before a general court martial convened at Fort Leavenworth, Kansas, November 4, 1918, pursuant to Special Orders, No. 247, War Department October 22, 1918, of which Major Samuel A. Smoke, U. S. Army, retired, was president, Major Walter Smith, Coast Artillery Corps, was judge advocate and 1st Lieut. Louis A. Humason, was assistant judge advocate, were arraigned and tried.

General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Maskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Coq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534.

Charge I. "Violation of the 96th Article of War."

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Coq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970;

7 William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry alias Archie Whittenberry, Registered No. 13252; (Nolle prosequi pg. 334 W. S.); William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534; did, at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 27th, 28th and 29th days of July, 1918, unlawfully, wickedly and maliciously conspire, confederate and agree together feloniously, wilfully and of their malice aforethought to kill and murder General Prisoner Shelby Hisle, Registered No. 13766.

Charge II. "Violation of the 92d Article of War."

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Haskell, Registered No.

12288; Tony Feo, Registered No. 12496; Robert H. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry alias Archie Whittenberry, Registered No. 13252; (Nolle prosequi pg. 334 W. S.); William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534; acting jointly and in pursuance of a common intent, did, at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 29th day of July, 1918, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and premeditatedly, kill General Prisoner Shelby Hisle, Registered No. 13766, a human being, by striking, kicking, stamping him and by cutting him with a knife.

To which each and every one of the accused individually pleaded:

To The Specification, Charge I; "Not guilty."

To charge I: "Not guilty."

To the Specification, Charge II: "Not guilty."

To charge II: "Not guilty."

Finding.

The court finds the accused:

General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012, Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; Millard Bowers, Registered No. 13534; each individually:

Of The Specification, Charge I: "Not guilty."

Of Charge I: "Not guilty."

The court finds the accused; General Prisoners Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward J. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; each individually:

Of the Specification Charge II: "Not guilty."

Of Charge II: "Not guilty."

8 The court finds the accused: General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney,

Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; Millard Bowers, Registered No. 13534, each individually:

Of the Specification, Charge II: "Guilty, except the words "Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; "Stamping, and cutting him with a knife," substituting the word "and" before the word "kicking," of the excepted words "Not guilty," and of the substituted word, "Guilty."

Of Charge II: "Guilty."

Sentence.

The court therefore acquits the accused: General Prisoners Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; each individually.

The court sentences the accused: General Prisoners William Cook, Registered No. 11617; Abraham Garellick, Registered No. 12184; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; Millard Bowers, Registered No. 13534; each individually, to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life.

The court sentences the accused: General Prisoners Alexander Kahn, Registered No. 11680; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; each individually, to be hanged by the neck until dead. Two-thirds (2/3) of the members of the court concurred therein in each case.

The record of trial having been forwarded for the action of the President the following are his orders thereon:

In the foregoing case of General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 12288; Toney Feo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534; The findings of not guilty of Charge I and the specification thereunder (as to all of the said above-named general prisoners, and the findings of not guilty of Charge II and the specification thereunder, as to General Prisoners Orville Haskell, Reg-

istered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; and Earl Ross, Registered No. 13128, are approved. The findings of guilty of Charge II and the specifications thereunder as to General Prisoner Harold J. Keyes, Registered No. 12917, and the sentence imposed upon the said General Prisoner, Harold J. Keyes, Registered No. 12917, are disapproved. General Prisoners Orville Haskell, 1, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; and Harold J. Keyes, Registered No. 12917; will be restored to the status severally occupied by them at the commencement of these proceedings. The findings of guilty of Charge II and the specification thereunder and the sentence imposed as to each of the General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; and Millard Bowers, Registered No. 13534, are approved. The sentence as to each of the General Prisoners Alexander Kahn, Registered No. 11680; Robert R. Le Cocq, Registered No. 12666; and Donald Fisher, Registered No. 12667; is commuted to confinement, at hard labor, for the term of his natural life. The period of confinement at hard labor provided in the sentence as to General Prisoner Francis J. Cooney, Registered No. 13378; is reduced to twenty (20) years. The period of confinement at hard labor provided in the sentence as to each of the General Prisoners, William Cook, Registered No. 11617; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; George A. Polson, Registered No. 13415; and Millard Bowers, Registered No. 13534; is reduced to fifteen (15) years.

The period of confinement at hard labor provided in the sentence as to General Prisoner Abraham Garellick, Registered No. 12184, is reduced to two (2) years. The United States Penitentiary, Leavenworth, Kansas, is designated as the place of confinement of General Prisoners Alexander Kahn, Registered No. 11680; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Francis J. Cooney, Registered No. 13378; William Cook, Registered No. 11617; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; George A. Polson, Registered No. 13415; and Millard Bowers, Registered No. 13534; And the United States Disciplinary Barracks, Fort Leavenworth, Kansas, is designated as the place of confinement of General Prisoner Abraham Garellick, Registered No. 12184.

As thus commuted and mitigated, each and every of the sentences, with the exception of that imposed as to General Prisoner Harold

J. Keyes, Registered No. 12917, which is hereby disapproved, will be carried into execution.

WOODROW WILSON.

The White House,
3 Feb'y, 1920.

By order of the Secretary of War:

General, Chief of Staff.

Official.

P. C. HARRIS,
The Adjutant General.

10 And your petitioners further state that they are restrained of their liberty by respondent pursuant to the foregoing orders, judgments and sentences.

And your petitioners state that said orders, judgments and sentences were and are invalid for the following reasons:

That the order appointing said general Court-martial in violation of the provisions of the Fifth Article of War which requires that general courts martial shall not consist of less than thirteen members when that number can be convened without manifest injury to the service designated only eight persons to serve as members of said court martial, notwithstanding thirteen members could have been convened and the said order named only three officers in the military service of the United States competent to serve on said court-martial and only three such officers sat as members of said court-martial.

And the said general Order Numbered 21, published on February 9, 1920, and the said Special Orders No. 247, published October 19, 1918, show that the tribunal or court-martial by which your petitioners were tried, convicted and sentenced was not constituted as required by the laws of the United States concerning Courts-martial; that it appears from said orders and on the face of the proceedings that the President of said Court-martial, to-wit: Major Samuel A. Smoke, was not an officer in the military service of the United States; that Captain Henry M. Fales, was not an officer in the military service of the United States; and that said Smoke and Fales were retired from the military service of the United States, at the time of their detail and service on said Court-Martial; that it does not appear from the face of said proceedings that said Smoke and Fales consented to be assigned to active duty on said court-martial or that said Smoke and Fales were employed on active duty at the time they were assigned or detailed for service on said Court-Martial, or at the time of service thereon, that the record of said proceedings discloses that said persons did not possess the qualifications required by the 4th Article of War,

or by Clause A, Subdivision (b) of the Manual for Courts-
11 Martial; that said record fails to disclose that they possessed
the qualifications required by laws of the United States (Act
of Apr. 23, 1904, 33 Stat. 264; Sec. 24, Act of June 3, 1916, 39 Stat.,
183).

And your petitioners further show to the court that First Lieutenant and Marion Donker, United States Guards, Second Lieutenant Rich-

ard N. Lewis, United States Guards, and Second Lieutenant William Jones, United States Guards, are not shown by the said record to be officers in the United States Army and that it does not appear whether said Guards were in the Coast Guard or Revenue Cutter Service or in what service of the United States said Guards were employed or that they were competent to serve as members of said General Court-Martial.

Your petitioners further state that the courts of the United States in the District of Kansas and throughout the United States and the courts of the State of Kansas and the several states, were, on the 29th day of July, 1918, and since have been and now are open and engaged in the free and uninterrupted and prompt administration of justice and that said 29th day of July, 1918, was a time of peace in the said State and District of Kansas and within the geographical limits of the States of the Union and the District of Columbia.

And your petitioners state that the rights of your petitioners under the 92d Article of War, which provides that no court-martial shall have jurisdiction to try any person for murder committed within the geographical limits of the Union and States and the District of Columbia, in time of peace have been violated by the said trial conviction and sentence on said charge of murder. And your petitioners state that their right to trial by jury on said charge has been violated and that their subjection to confinement under sentence of a court-martial, on said charge of murder and their trial and sentence by the United States acting through and by its President and army officers amounted to a violation of the rights of petitioners under the second section of Article Three of the Constitution of the United States which provides that:

12 "The trial of all crimes * * * shall be by jury,"
and also a violation of the rights of the petitioners under the Sixth Amendment to the Constitution of the United States, which provides that—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

and also a violation of the rights of petitioners under the Fifth Amendment to the Constitution of the United States which provides that—

"No person shall be * * * deprived of life, liberty or property without due process of law."

That said court-martial was also without jurisdiction under the said charge under the undisputed evidence adduced in support thereof by the prosecution to impose a sentence for murder for the reason that said charge alleges that said Hisle was killed by striking, kicking, stamping and by cutting him with a knife, and the said undisputed evidence on the part of the prosecution shows that said Hisle was killed not by being struck or kicked or stamped or by being cut with a knife, but that his death was the direct result

of a fall which caused his head to come in contact with an iron bar and caused a fracture of the skull from which said Hisle died.

And your petitioners show that said court-martial had no jurisdiction or authority, legally, to try and sentence them in the manner and form above stated; that the subjection of your petitioners to trial on said charge of murder and sentence by court-martial amounts to a usurpation on the part of the executive of judicial power and is a violation of the rights of petitioners under Section One of Article Three of the Constitution of the United States vesting the judicial power in the courts and under Section Two of said Article Three extending the judicial power to all cases in law arising under the Constitution and laws of the United States, thus and thereby depriving your petitioners of a trial before a tribunal in which the judicial power of the United States is lawfully vested.

13 That your petitioners were at said United States disciplinary barracks serving sentence imposed by general courts martial for alleged military offenses on and prior to the 29th day of July, 1918; that by said sentences your petitioners were discharged from the army of the United States long prior to said 29th day of July, 1918.

And your petitioners show to the court that the crime of murder as defined by the laws of the United States and the Articles of War, as construed by the courts and the war department is a crime against the civil power alone and not a military offense and that if the said 92 Article of War, essayed to give jurisdiction to a court-martial to try persons charged with murder committed within the geographical limits of the States of the Union when the courts were open and engaged in the administration of justice, then said Article would be wholly null and void and amount to an attempt on the part of Congress to deprive men of their lives without according them their constitutional rights under the aforementioned provisions of the Constitution of the United States. That your petitioners are illegally held, as aforesaid, in solitary confinement, as aforesaid, under or by color of the authority of the United States.

Wherefore, to be relieved of said unlawful detention and imprisonment, and the consequences of said void sentence your petitioners pray that a writ of habeas corpus to be directed to the said A. V. Anderson, Esq., may issue in this behalf, so that your petitioners may be forthwith brought before this Court to do, submit to, and receive what the law may require.

ALEXANDER KAHN,
DONALD FISHER,

ROBERT R. LE COQ,
FRANCIS J. COONEY,
WILLIAM SCHEIMAN,
GEORGE W. JERUE,
WM. F. PETERS,
WILLIAM COOK,
GEORGE A. POLSON,
MILLARD BOWERS,

Petitioners.

14 UNITED STATES OF AMERICA,
District of Kansas, ss:

Alexander Kahn, Donald Fisher, Robert L. Le Cocc, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook George A. Polson, and Miliard Bowers, depose and say that they are the petitioners named in the foregoing petition subscribed by them, and that the statements therein made are true as they verily believe.

ALEXANDER KAHN.
DONALD FISHER.
ROBERT R. LE COCQ.
FRANCIS J. COONEY.
WILLIAM SCHEIMAN.
GEORGE W. JERUE.
WM. F. PETERS.
WILLIAM COOK.
GEORGE A. POLSON.
MILLARD BOWERS.

Subscribed and sworn to before me this 9th day of April, 1920.
THOS. C. TAYLOR,

[SPAL.]

THOS. C. TAYLOR,
*Notary Public, Leavenworth
County, Kansas.*

My Comm. expires Jan. 13, 1923.

**ISAAC B. KIMBRELL,
MARTIN J. O'DONNELL,**
Attorneys for Petitioners.

Filed in the District Court on April 14, 1920.

1

Motion to Dismiss Petition.

Comes now the respondent, August V. Anderson, Warden of the United States Penitentiary, at Leavenworth, Kansas, and moves the court for an order to dismiss the petition herein for a writ of habeas corpus for the following reasons:

First. That the application does not state facts sufficient to give the court jurisdiction to grant the writ as prayed.

Second. The Petition shows on its face that if the writ were granted the same would be discharged on the return, and the petitioners remanded to the custody of the respondent.

Third. The Petition shows on its face that the petitioners have not completed the term of imprisonment imposed by the judgment and sentence of the general court-martial, and that he is not entitled to release on habeas corpus at this time.

Wherefore, Respondent prays that petition be dismissed and the writ denied.

L. S. HARVEY,
Assistant U. S. Attorney,
Attorney for Respondent.

Filed in the District Court on May 6, 1920.

Final Decree.

This cause having been heretofore submitted to the court on the motion of the respondent to dismiss the petitioners' petition for a Writ of habeas corpus and the court having heard the arguments of counsel and being fully advised in the premises, doth sustain said motion for the reasons stated in said motion and it is by the court ordered, adjudged and decreed that the said petition for habeas corpus be and the same is hereby dismissed and that the respondent have and recover of and from the petitioners his costs herein expended.

Dated this 11th day of June, 1920.

JOHN C. POLLOCK,
Judge.

Filed in the District Court on June 11, 1920.

Petition for Appeal.

Now come the petitioners, Alexander Kahn, Donald Fisher, Robert L. Le Cocq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, and conceiving themselves aggrieved by the decree and judgment rendered and entered in the above entitled cause, on the 11th day of June, 1920, do hereby appeal from said judgment and decree to the Supreme Court of the United States of America for the reasons specified in the assignment of errors, filed herewith and petitioners pray that their appeal may be allowed and that citation be issued, as provided by law, and that a transcript of the record proceedings, documents and papers upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States of America, under the rules of such court in such case made and provided.

ISAAC B. KIMBRELL,
MARTIN J. O'DONNELL,
Solicitors for Petitioners.

Filed in the District Court on June 11, 1920.

Assignments of Error.

Now come the petitioners herein and say that in the record and proceedings herein there is manifest error, in this:

- (1) The court erred in decreeing a dismissal of the petitioners' petition.

(2) The court erred in holding that the general court-martial had jurisdiction to try petitioners on a charge of murder.

(3) The court erred in holding to be valid and constitutional the 92nd Article of War, and that it authorized a general court-martial at a time and place when the courts were open to try your petitioners on a charge of murder.

(4) The court erred in denying to your petitioners the benefit of Section 2, of Article 3, of the Constitution of the United States providing that the trial of all crimes except in cases 17 of impeachment shall be by jury.

(5) The court erred in permitting respondent to deprive petitioners of their liberty under sentences rendered in violation of the rights of the petitioners under the 5th Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law.

(6) The court erred in holding that the Executive power of the United States at a time when the courts were open could usurp judicial functions and exercise that judicial power which was exclusively vested in the courts by sections 1 and 2 of Article 3 of the Constitution of the United States.

(7) The court erred in holding that a tribunal composed of retired officers of the army and of United States Guards, were officers of the army of the United States, and that they possessed the qualifications required by the laws of the United States, for members of a general court-martial.

(8) The court erred in holding that a tribunal consisting of eight members could try the petitioners for their lives in violation of the provisions of the Fifth Article of War, requiring that General Courts-Martial shall not consist of less than thirteen (13) members.

(9) The court erred in holding that petitioners were not entitled to the protection of the Sixth Article of Amendment to the Constitution of the United States, providing that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed and that a court-martial had jurisdiction without the aid of a jury to try petitioners, for the crime of murder, at a time and place where the courts were open and during a time and place where peace existed within the meaning of the law.

And of the matters and things herein contained, petitioners
18 pray the judgment of the court.

ISAAC B. KIMBRELL,
MARTIN J. O'DONNELL,
Solicitors for Petitioners.

Issuance and service of a citation herein waived. Appearance in the Supreme Court hereby entered.

*District Attorney for the Dist. of Kansas
and Attorney for Appellee.*

Filed in the District Court on June 11, 1920.

Order Allowing Appeal.

On motion of petitioners Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers and it appearing to the court that this cause involves the instruction and application of the Constitution of the United States, and the constitutionality of a law of the United States.

It is hereby ordered that an appeal to the Supreme Court of the United States of America from the judgment and decree heretofore and on the 11th day of June, 1920, rendered and entered herein be and the same is hereby allowed and that a certified transcript of the record, motions, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States of America.

Dated this 11th day of June, 1920.

JOHN C. POLLOCK,

Judge.

Bond.

Know All Men By These Presents, that we, Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers, as principals and Martin

J. O'Donnell and Robert F. McKinstry, as sureties are held
19 and firmly bound unto August V. Anderson, Warden of the

United States Penitentiary at Leavenworth, Kansas, in the full and just sum of Two Hundred and Fifty Dollars, (\$250.00) to be paid to the said August V. Anderson, his heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns jointly and severally by these presents.

Sealed with our seals and dated on this 11th day of June, 1920.

Whereas, lately at the April term of the United States Court for the District of Kansas, in a suit pending in said court wherein Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers, the above named petitioners prayed for a writ of habeas corpus to discharge them from the custody of Respondent, August V. Anderson, Warden of the United States Penitentiary at Leavenworth, Kansas, judgment was rendered against the said petitioners and the said petitioners have obtained an appeal of the said court to reverse the

judgment and decree in the aforesaid suit and a citation directed to the said respondent, citing and admonishing him to be and appear in the Supreme Court of the United States of America, to be holden at Washington, District of Columbia, thirty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said petitioners shall prosecute said appeal to effect and answer, all damages and costs, if they fail to make good their plea then the above obligation to be void, else to remain in full force and virtue.

ALEXANDER KAHN.

DONALD FISHER,
ROBERT L. LE COOG,
FRANCIS J. COONEY,
WILLIAM SCHIEMAN,
GEORGE W. JERUE,
WILLIAM F. PETERS,
WILLIAM COOK,
GEORGE A. POLSON,
MILLARD BOWERS,

Petitioners.

By MARTIN J. O'DONNELL,

Their Attorney.

MARTIN J. O'DONNELL,
ROBERT F. MCKINSTRY,

Sureties.

20

Approved 11th day of June, 1920.

JOHN C. POLLOCK,

Judge.

Filed in the District Court on June 11, 1920.

Principle & Proof of Service.

To the Clerk of the United States District Court for the District of Kansas:

Please incorporate in the transcript of proceedings to be forwarded to the Supreme Court of the United States of America in the above entitled cause, the following:

- (1) Petition.
- (2) The Motion to Discuss Petition.
- (3) The Final Decree and Judgment.
- (4) Petition for Appeal.
- (5) Assignment of Errors.
- (6) Order Allowing Appeal.
- (7) Bond on Appeal.

ISAAC B. KIMBRELL,
MARTIN J. O'DONNELL,
Solicitors for Petitioners.

Affidavit.

STATE OF MISSOURI,
County of Jackson, etc.:

Martin J. O'Donnell of lawful age being duly sworn on his oath states that he served the above and foregoing Praecepte upon the Respondent by delivering a copy thereto to his attorney, L. S. Harvey, Assistant United States Attorney, for the District of Kansas, on this 11th day of June, 1920.

MARTIN J. O'DONNELL.

21 Subscribed and sworn to before me this 11th day of June, 1920.

[SEAL.]

HELEN HULL,
Notary Public.

My Commission expires May 31, 1921.

Filed in the District Court on June 11, 1920.

UNITED STATES OF AMERICA,
District of Kansas, etc.:

I, F. L. Campbell, Clerk of the District Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be true, full and correct copies of so much of the record and proceedings in Case No. 2081, entitled In the Matter of the Application of Alexander Kahn, et al. for a Writ of Habeas Corpus in said court, as is called for by the Praecepte filed herein.

I further certify that the Original Citation is attached hereto and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 14th day of June, 1920.

[Seal of District Court U. S., District of Kansas.]

F. L. CAMPBELL,
Clerk.

Endorsed on cover: File No. 27,778. Kansas D. C. U. S. Term No. 421. Alexander Kahn, Donald Fisher, Robert L. Le Corp, et al., appellants, vs. August V. Anderson, Warden of the United States Penitentiary at Leavenworth, Kansas. Filed June 25th, 1920. File No. 27,778.